In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1077

ERNEST MALLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial to the court, a jury having been waived (A. 4),[1] petitioner was convicted (A. 40) in the United States District Court for the Northern District of Illinois on both counts of a two-count indictment (A. 2–3) charging him with having sold heroin without a written order on the prescribed form (count 1) and with having received and concealed the same heroin with knowledge that it had been illegally imported (count 2), in violation of 26 U.S.C. 4705(a)

[1] The record filed with the petition for a writ of certiorari consists of the excerpts from the trial transcript contained in the appendices to petitioner's and the government's briefs in the court of appeals ("A." and "G.A.", respectively) and the proceedings in that court ("C.A.R.").

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and 21 U.S.C. 174, respectively. On May 24, 1966, he was sentenced to seven years' imprisonment on each count, to run concurrently, and fined $1,000 (A. 42–43). On January 5, 1967, the court of appeals affirmed, *per curiam* (C.A.R. 1; Pet. App. 2a). The petition for a writ of certiorari, filed February 18, 1967, is out of time under Rule 22(2) of the Rules of this Court. Further review is, in any event, unwarranted.

The evidence adduced by the government established that, on February 26, 1965, petitioner offered to sell five "spoons" of heroin to Dorothy Jones, a confidential informant of the Federal Bureau of Narcotics, for $500 (A. 7, 23–24). That evening, following communication of this information by Miss Jones to the Narcotics Bureau, Narcotics Agent Carl Jackson, posing as an associate of Miss Jones, delivered $500 to petitioner in the vestibule of Miss Jones' apartment house (A. 7, 9–11, 17, 20, 24–25). Petitioner, after counting the money, told the agent to tell Miss Jones to meet petitioner in a short while at a designated tavern in the vicinity to pick up the heroin (A. 10–11, 17–18). An hour later, at the tavern, petitioner delivered the heroin to Agent Jackson in the presence and at the direction of Miss Jones (A. 11–12, 25–26).

A second narcotics agent, David Connelly, testified that he had observed petitioner enter Miss Jones' apartment house at about the time that Agent Jackson, according to the latter, delivered the purchase money to petitioner (G.A. 2–3).

Petitioner, testifying in his own behalf, denied the testimony of Miss Jones and the two agents and stated that he did not even know Miss Jones (A. 37–38). He acknowledged on cross-examination that he had a record of three burglary convictions (G.A. 3–4).

1. There is no merit in petitioner's contention (Pet. 4–5) that it was unfair for the trial judge, in evaluating the credibility of petitioner and the government witnesses, to take into account the fact that petitioner had "a triple felony record," whereas the government witnesses had no criminal records (Pet. 4; G.A. 4). It is well settled that the finder of the facts (whether it be the judge or a jury) may consider a witness' criminal record in weighing his testimony. *E.g., Daniel* v. *United States,* 268 F. 2d 849, 852 (C.A. 5); *United States* v. *Senior,* 274 F. 2d 613, 616 (C.A. 7). There is no warrant for the claim that petitioner was found guilty "because" of his prior convictions (Pet. 4).

2. Nor is there substance to petitioner's argument that the evidence is insufficient to support the verdict because of discrepancies in the testimony of the two principal government witnesses, Miss Jones and Agent Jackson (Pet. 5–7). The asserted conflicts relate not to details of the offense concerning which the witnesses testified, but to such peripheral matters as how long Miss Jones and the agent had known each other and whether Miss Jones had previously acted as a confidential informant of the officer (Pet. 6). Such discrepancies—to the extent that there were

any[2]—presented, at most, issues of credibility for the trial judge to resolve.

[2] The record does not unequivocally reflect any of the alleged discrepancies (see Pet. 6). With respect to how long Agent Jackson and Miss Jones had been acquainted, the agent stated that he had known her for about a year and a half prior to the date of the offense involved here (February 26, 1965), their acquaintance apparently beginning when the agent arrested her on a narcotics charge (A. 13, 17). Miss Jones' testimony, on cross-examination, also indicated that their acquaintance began with her arrest but revealed confusion over the date. She stated variously that the arrest was made "[a]round '56," that she had "made a mistake" and "was thinking about something else," and that it occurred "in '55, I believe." When defense counsel then suggested that she must have "known Agent Jackson for quite a few years," however, she replied, "Well, I wouldn't say quite a few years, but I have known him." Her final testimony on the point was that she had known him "longer than a month" (A. 31).

Contrary to petitioner's assertion, Agent Jackson's testimony did not contradict Miss Jones' statement that her only visit to the Narcotics Bureau office was the *evening* of February 26, 1965 (A. 27, 31–32). He testified, on direct examination, that he spoke with her by telephone that morning (A. 7). On cross-examination, he acknowledged that he had stated in his official report that he had "met with" the informant at his office on the morning in question (A. 18–19). His present recollection, however, was that it "was a telephone call," although he agreed, in light of the report, that it was "quite possible" that he had met with her in person (A. 19).

It is true that, while Agent Jackson testified that he had used Miss Jones as an informant prior to petitioner's offense (A. 17), she denied any such earlier role (A. 32). Immediately prior to the denial, however, she stated, in response to the question whether she had previously worked as an informant for the agent, "No, *only when they arrested me*" (*ibid.*; emphasis supplied). It is thus at least doubtful that Miss Jones meant to deny categorically that she had ever previously served as an informant.

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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